UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

No. 7009

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a Corporation,

Appellant,

vs.

FRANK NOEL,

Appellee.

Petition for Rehearing

D. V. Morthland, Yakima, Wash.,
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MARTIN & DICKSON, *Printers*

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To the Honorable Circuit Court of Appeals of the United States for the Ninth Circuit and to the Judges thereof:

Comes now Universal Automobile Insurance Company, a Corporation, Appellant in the above entitled cause, and presents this its Petition for a rehearing of the above entitled cause and in support thereof respectfully shows:

I.

That the construction placed by this court upon the policy provision as to "towing" is unduly restricted.

In its opinion filed hereon on April 24 this court said:

> "There was no such towing or dragging of the steam shovel. On the contrary, it was proceeding under its own power, and appellant's own witnesses testified that it was not being towed. The same is true of the respective trucks."

It is respectfully contended by your Petitioner that the above language and the decision in this case limit the policy provision to a degree unwarranted by the language therein used. The terms are to be construed in the light of ordinary acceptation as to their meaning. A reading of the policy herein shows a clear intention to exclude coverage when the vehicle insured is operated in attachment with another. The primary purpose of the provision is to exclude the increased hazards resulting from such operation. That hazard is present whether the vehicle is actually dragging another vehicle or whether all are operating under their own power and are attached merely as a "precautionary measure" as contended for in this case. The hazard of towing a trailer on a paved highway cannot compare with that of operating a series of trucks, chained to each other and these in turn chained to a heavy shovel, up a narrow mountain road over steep grades and around dangerous curves. Under this court's decision the insured cars in the

last case are entitled to coverage, but no coverage would be extended in the former instance.

The strained interpretation which the court places on the policy provision is also shown by the fact that under the language of the decision a car may be towing one moment and not the next. Stress is laid on the evidence of one of the employees of the owner of the truck that the cables were kept slack by means of hand signals. It might be noted in passing that this testimony places a strain on the credulity of any court or jury. Aside from that fact, if given weight, it means that the slackness of the connecting line is decisive as to towing. Therefore, going uphill one may be towing; going downhill, he would not be. The hazard may be as great or more in the latter instance, but coverage is not excluded.

In the trial court and in this court, Appellee has strenuously contended that the trucks were attached simply as a precautionary measure and to prevent slipping; if one truck went over the grade, the others could help it. We ask, what is this but towing? A truck which is held on the road by being attached to another is being towed in the ordinary sense of the term.

The court in its opinion asserts that Appellant contends for a restricted definition of the word "tow-

ing." It is respectfully submitted that it is the opinion of the court which unduly restricted the word, and Appellant seeks merely to have the term construed from the viewpoint of ordinary usage, so that it will include the hazards which are immediately suggested by the exclusion in the policy.

If the court's decision herein is to stand as the law, it means that every insurance policy is thereby affected and that cases now pending will be governed by the narrow construction herein announced, a definition of the word "towing" which was not in the contemplation of the parties at the time of making the contract.

II.

The opinion of the court herein recites as facts material matters which are not in evidence.

The court in its opinion states:

> "It is suggested that the brake on the lead truck slipped, causing it to back into the others. The shovel was not fastened to the truck at the time, and the first two trucks were also unfastened."

There is no evidence in the record to support the assumption that the lead truck backed against the second truck and caused all to go over the bank. This suggestion was devised by Appellee to avoid the inescapable inference that the trucks all went over by

reason of their being fastened together. When it was pointed out at the argument that there was no evidence to sustain this suggestion, counsel for Appellee apologized to the court.

The above quoted statements from the opinion also contain a further misquotation from the evidence in that there was a conflict as to whether the shovel and first and second trucks were unfastened at the time of the loss. C. A. Case testified that although the chain had been removed between the shovel and third truck he saw Noel replace it. (Tr. p. 60.) Brinier testified that a chain fastened the first and second trucks, the cable being between the shovel and last truck. (Tr. p. 71.) The cable was found lying in the road after the accident and no chain was found. It is contended, as was pointed out at the hearing, that there was a conflict in the evidence on this point and that the jury might well have found that all the vehicles were fastened together at the time of the accident.

The above matters were material to Appellant's case herein and a conflict existed in the evidence which the jury was entitled to decide. Because of the above quoted statement from the court's opinion, it is believed that the court misapprehended the evidence in this regard.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of the District Court of the United States for the Eastern District of Washington, Southern Division, be upon further consideration reversed.

Respectfully submitted,
D. V. MORTHLAND, Yakima, Wash.,
HAROLD A. SEERING, Seattle, Wash.,
WHITTEMORE & TRUSCOTT, Seattle, Wash.,
W. J. TRUSCOTT (*of Counsel*),
Seattle, Wash.,
Attorneys for Appellant.

We, D. V. MORTHLAND, HAROLD A. SEERING, CLEM J. WHITTEMORE and W. J. TRUSCOTT, hereby certify that we are the solicitors and of counsel for the Appellant in the above entitled action and that the foregoing Petition for rehearing is not presented for purposes of delay or vexation but is in our opinion well grounded in law and fact and proper to be filed herein.

D. V. Morthland
Harold A. Seering
Clem J. Whittemore
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